A HEALTH CARE PROVIDER'S GUIDE TO CONSENT TO HEALTH CARE

DEVELOPED BY THE MINISTRY OF HEALTH AND
MINISTRY RESPONSIBLE FOR SENIORS

AND

THE PUBLIC GUARDIAN AND TRUSTEE
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1.0 OVERVIEW AND GENERAL INFORMATION

1.1 New Laws for Adults in B.C.

B.C. has four new laws that promote self-determination and autonomy for adults and create a comprehensive and integrated system of support and assistance for adults who need help in making decisions about their health, personal care, or financial matters, or who are abused or neglected. Selected sections of these new laws came into force on February 28th 2000.

The new laws are:

- The ***Representation Agreement Act***
- The ***Adult Guardianship Act***
- The ***Health Care (Consent) and Care Facility (Admission Act),*** *and*
- The ***Public Guardian and Trustee Act.***

The legislation makes it possible for all adults to plan for a time when, through accident, disability or illness, they can no longer make their own decisions, by choosing someone they trust to make decisions for them.

The new legislation also provides a legal basis for the common practice of asking an adult's spouse or close relative to consent to health care when the adult cannot make such decisions.

The role of family, friends and volunteers in helping adults who need support and assistance in making their own decisions is formally acknowledged.

Parts 1, 2, 4, and 5 of the *Health Care (Consent) and Care Facility (Admission) Act* and the *Representation Agreement Act*, along with the *Public Guardian and Trustee Act*, and Part 3 of the *Adult Guardianship Act* (dealing with the provision of support and assistance to abused or neglected adults) will came into force on February 28th 2000.

'Health care' means anything that is done for a therapeutic, preventive, palliative, cosmetic or other purpose related to health. It includes a course of health care, such as a series of immunizations or dialysis treatments or a course of chemotherapy. 'Health care' also includes participation in a medical research program approved by a designated ethics committee.

References to sections of the Act are in parentheses.

1.2 Purpose of this Guide

The purpose of the guide is to help you to understand the ***Health Care (Consent) and Care Facility (Admission) Act***, particularly the parts dealing with health care consent.

This guide is written for health care providers, but it will also be helpful to individuals, families, friends, advocacy groups, community service providers and anyone else who is interested in the issue of health care consent.

> **'Health care provider'** includes: physicians, registered nurses, dentists, optometrists, podiatrists, psychologists, and social workers. It also includes those licensed under the *Health Professions Act*, such as midwives, and those who might become licensed under that Act in the future. For a complete list of health care providers see Appendix A.

Most of the health care consent part of the legislation is summarized in the flow charts found in Appendix C of this guide. You are encouraged to refer to these charts often as you go through the guide.

1.3 Kinds of Substitute Decision-makers

The *Health Care (Consent) and Care Facility (Admission) Act* refers to several kinds of substitute decision-makers for adults who are incapable of making health care decisions. These terms are used in this guide. In most cases, these are the same family members and friends who are involved now in supporting adults who need help with decisions, or in making decisions for them. The following table explains the new terms.

Type of Substitute Decision-Maker	Who Appoints	Who will be Appointed	How Appointed	Scope of Authority
Court Appointed Committee of the Person[1]	The Supreme Court of B.C.	Someone who is close to the adult and not in a conflict of interest.	By a court order.	Broad scope, including most of the decisions in the adult's life; will usually be in force for a long period of time.
Representative	The adult when capable.	Anyone the adult chooses and who meets basic criteria.	In a Representation Agreement (which is a proxy type of advance health care directive).	Defined in the Agreement.
Temporary Substitute Decision-Maker	The health care provider (or the Public Guardian and Trustee).	A family member or friend (or the Public Guardian and Trustee when there is no one else).	Chosen, as required, for health care decisions.	Limited to the health care decision at issue and for a limited period of time.

1.4 The Act Does Not Apply:

- to those 18 years of age or younger (the *Infants Act* continues to govern consent to health care for young people under the age of 19);
- to psychiatric treatment and care for those who are **involuntarily** admitted to provincial mental health facilities, or psychiatric units in hospitals, under the *Mental Health Act*;
- to human tissue gifts; involuntary treatment for communicable diseases (including tuberculosis and sexually transmitted diseases); and other health care interventions mentioned in the *Health Act*;
- to emergency medical assistants (ambulance crews) during the course of their work;
- to non-therapeutic sterilization where a person is incapable of giving or refusing consent. Substitute decision-makers are prohibited from giving substitute consent to such procedures by a decision of the Supreme Court of Canada.

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[1] Committees of the person are currently appointed under the *Patients Property Act*. This *Act* will remain in force until it is repealed by Part 2 of the *Adult Guardianship Act*, which is not being proclaimed at this time. If, and when, Part 2 comes into force, the current system of committeeship will be replaced by a system of court-appointed substitute decision-makers and guardians.

2.0 FOUNDATIONS OF THE NEW LAW

Two elements form the foundation of British Columbia's new health care consent legislation: the presumption of capability; and the right to give or refuse consent.

2.1 The Presumption of Capability (s. 3)

Every adult is presumed to be capable of giving, refusing or revoking consent to health care until the contrary is demonstrated. An adult's way of communicating is not, by itself, grounds for deciding that he or she is incapable of giving, refusing or revoking consent.

2.2 Consent Rights (ss. 4 & 5)

Every adult who is capable of giving or refusing consent to health care has the right to:

- give or refuse consent on any grounds, including moral or religious grounds even if refusal will result in death;
- select a particular form of available health care on any grounds, including moral or religious grounds;
- revoke (or withdraw) consent;
- have their health care decisions respected; and
- be involved to the greatest degree possible in all case planning [health care] and decision-making.

Note: These elements are not new, but it is the first time they have been set out in legislation in British Columbia.

Section 5 states the general consent rule that health care must not be provided to an adult without the adult's consent unless one of the exceptions described in sections 11 to 15 of the Act applies. (See 5.0 "Exceptions I: Providing Health Care Without the Adult's Consent", and 6.0 "Exceptions II: Providing Health Care with Substitute Consent" below.)

One of the legal effects of the wording of section 5 is that a health care provider cannot act directly on an adult's advance directive (AD), unless it is an urgent or emergency situation, or triage or other kind of preliminary examination. In all other situations, if the adult is incapable, the health care provider must obtain a consent decision from a substitute decision-maker who must, however, make the decision in accordance with the adult's wishes or instructions expressed while capable, if these are known.

3.0 WHAT IS CONSENT?

3.1 Requirements for a Valid Consent (s. 6)

Valid consent is sometimes referred to as 'informed consent'. The Act states that consent to health care is valid only if:

- the consent relates to the health care that is proposed;
- the consent is given voluntarily;
- it is not obtained by fraud or misrepresentation;
- the adult is capable of giving or refusing consent;
- the health care provider gives the adult the information a reasonable person would need to make an informed decision, including information about:
    - the condition for which the health care is proposed;
    - the nature, including risks and benefits of the proposed health care that a reasonable person would expect to be told about;
    - any alternative courses of health care, including the option of having no health care at all.
- the adult has the opportunity to ask questions and receive answers about the proposed health care.

These elements apply to capable adults and also apply to situations where substitute consent is being sought from someone making decisions on the adult's behalf, such as a representative, a committee of person, or a temporary substitute decision-maker. (s.10)

3.2 What Information Would a Reasonable Person Need?

The Act requires a health care provider to give the adult the information "a reasonable person" would need to make a decision.

The scope of the information that must be given varies with each situation. As a health care provider, you should make reasonable efforts to find out about the adult's concerns and personal circumstances that might be relevant to that person's information needs. For example, removal of a facial mole may be a minor procedure for most people, but might be of great concern to a professional model. **The test is: "What information would a reasonable person in the patient's position want, in order to make a decision?"**

3.3 Information About Risks

The amount of information a person will need about potential risk depends on two things:

1) the seriousness of the potential harm from the proposed health care, and
2) the likelihood that the harm will occur.

If the potential harm is serious (e.g., death, paralysis or deafness), this should be explained to the adult, even if the chance of harm occurring is slim. If there is a significant chance of some harm occurring, this must be explained, no matter how minor the potential harm may be.

Sensitivity to the adult's unique circumstances, weighed against the risk of harm occurring, should guide a health care provider's judgment about what information to present, and the manner in which it is presented (e.g., with a supportive individual present).

3.4 Protection from Liability

A health care provider who makes an error related to the obtaining of consent will be protected from liability **if** he or she acts in good faith and uses reasonable care (s. 33).

4.0 OBTAINING CONSENT

4.1 Communicating in an Appropriate Way (s. 8)

A health care provider has a duty to communicate in a way that is appropriate to the adult's skills and abilities.

Often, someone close to the adult can help. As a health care provider, you are encouraged to invite family members, friends or other supportive individuals to help the adult to understand or to demonstrate an understanding of the information you give.

4.2 Different Ways of Communicating Consent (s. 9 (1))

A person can express consent in different ways: by speaking, by writing, by using an alternative or augmentative communication system, or by conduct that implies consent. For example, an adult might imply consent by:

- a nod of the head;
- offering an arm for an injection when requested; or
- complying with a treatment regimen.

Family members or friends can help the health care provider by confirming whether the adult is expressing agreement.

4.3 The Scope of the Consent (s. 9(4))

Consent to health care is specific to the treatment or procedure being discussed. Similarly, if the adult specifies that health care must be provided by a named provider, no one else may give the health care without first getting the adult's consent unless:

- the health care is already in progress when the adult's wishes become known, or
- delay is likely to put the adult's life or health at risk.

NOTE: THE SAME CONSENT RULES APPLY IN SITUATIONS WHERE SUBSTITUTE CONSENT IS BEING SOUGHT ON THE ADULT'S BEHALF. (s.10)

4.4 Consent to a Course of Treatment

You may ask an adult to consent to a number of different procedures that are part of an overall plan or course of health care, including repetitions of certain procedures. If so, you must get consent for the plan of care at the outset (e.g., at the start of a course of chemotherapy, or physiotherapy treatments). The health care can then continue until there is a change in the care plan or until the adult refuses the health care. When there is a change to the care plan or a new procedure not covered by the previous consent is introduced, consent for the new treatment must be obtained.

4.5 Providing Care Beyond the Scope of Consent (s. 9(3))

Not everything in health care is predictable. A health care provider may explain a procedure fully to an adult and get a valid consent. Then, part way through the procedure, the health care provider may find that something further, or something different, needs to be done. It is not always practicable to start over to get another consent.

A health care provider may provide additional or alternative health care to an adult if:

- the health care that was consented to is in progress;
- the adult is unconscious or semi-conscious;
- additional or alternative health care is medically necessary to deal with conditions that were unforeseen when consent was given.

For example, during surgery, something may be encountered that was not anticipated in advance. The surgeon can do what is medically necessary, even though the adult has not consented to the additional procedures.

In addition, the Supreme Court of Canada has ruled that if a patient demands, in the middle of a procedure, that the treatment stop but agrees to its continuation after a brief rest, the health care provider does not have to go through the process of obtaining a new consent.

NOTE: THE SAME CONSENT RULES APPLY WHEN YOU ARE OBTAINING SUBSTITUTE CONSENT FROM SOMEONE ACTING ON THE ADULT'S BEHALF.

4.6 Who is Responsible for Obtaining Consent?

The health care provider who is providing the health care is responsible for ensuring that a valid consent has been obtained, and may be liable if treatment proceeds without it. One health care provider (e.g., a surgeon) may obtain the patient's consent for a procedure involving a team of health care providers (e.g., nursing staff and other surgeons), although quite often some members of a team (e.g., an anesthetist) may choose to obtain a separate consent from a patient. This practice can continue.

4.7 Documenting Consent

If health care has been charted, the legal presumption is that it has been provided. While the Act does not address the documentation of consent, it is important to document accurately and completely all decisions made and actions performed.

A consent form is an administrative tool that is used to document the fact that the adult gave consent. A signed consent form can be evidence of consent, but it does not prove that the adult had all the information necessary to give a *valid* consent.

A person who witnesses the signing of a consent form is indicating only that the adult was seen signing the form, not that he or she was fully informed and understood the consent.

If you do not use a consent form, document how consent was obtained (for example, by the nod of the head) prior to the provision of treatment. Careful notes of your communication with the adult can help establish what information was given, should that ever be called into question.

A health care provider who makes an error related to the obtaining of consent will be protected from liability if he or she acts in good faith and uses reasonable care (s. 33).

5.0 PROVIDING HEALTH CARE WITHOUT THE ADULT'S CONSENT

The general rule is that a patient's consent is required for all types of health care. However, there are **two exceptions**:

1) health care in urgent or emergency situations (s. 12)
2) preliminary examination, treatment or diagnosis (s. 13)

5.1 Health Care in Urgent or Emergency Situations (s. 12)

> **'Severe pain'** is pain so severe that the adult is unable to give a valid consent. Once the pain is alleviated so that the individual can provide consent, the health care provider should obtain consent at that time.

Even in urgent or emergency situations, consent for health care should be obtained from the adult if possible. However, a health care provider may provide health care without the adult's consent if:

- the health care is needed promptly to save the adult's life, to prevent serious physical or mental harm, or to alleviate severe pain;
- the adult is apparently impaired by drugs or alcohol, is unconscious or semi-conscious or is for any other reason, in the health care provider's opinion, incapable of giving or refusing consent;
- the adult does not have a representative or a committee of the person who is authorized to consent to the health care, is capable of doing so, and is available; and,
- *if practicable*, a second health care provider confirms the first's opinion about the need for the health care and the adult's incapability.

A representative or committee of the person is "available" if it is possible for the health care provider, within a time that is reasonable in the circumstances, to determine whether the patient has a representative or committee and to communicate with that person (s. 12 (2)).

If the patient has an advance directive (AD) containing instructions/ wishes that clearly apply to the presenting health need and the range of treatment choices, these instruction/wishes should be followed. If there is doubt about them being the latest instructions expressed while capable or where the treatment of choice might not have been known when the AD was made, then the directive should not be followed.

See Appendix C for a flow chart setting out the procedure to follow in urgent or emergency health care situations.

5.2 Preliminary Examination, Treatment or Diagnosis (s. 13)

A health care provider may undertake triage or another kind of preliminary examination, treatment or diagnosis without complying with all the requirements to fully inform the adult if:

- the adult indicates that he or she wants the health care, for example, by coming to an emergency department or physician's office; or
- the adult's spouse, relative or friend indicates that he or she wants the adult to be provided with health care.

This section does not relieve health care providers of the ongoing professional obligation to explain to the adult what is going to be done and, to the greatest extent possible, obtain permission to provide treatment.

6.0 PROVIDING HEALTH CARE WITH SUBSTITUTE CONSENT

6.1 Making a Decision About Incapability

As a health care provider, you must assume that the adult is capable of making a health care decision until there is clear evidence that the adult is incapable of making the particular decision.

You can form a preliminary opinion about an adult's capability by communicating with the adult directly. If any questions arise about the adult's capability, you can consult with family and friends and talk to another health care or service provider who has recently been involved with the adult.

When deciding whether the adult is incapable, you must base your decision on whether or not the adult demonstrates an understanding:

- **of the information you are giving him or her, and**
- **that the information applies to his or her own situation (s. 7).**

It is recommended that you test the adult's understanding of the information you have given about the nature, risks and benefits and alternatives to health care by asking the adult to repeat this information in his or her own words or manner. You would decide that the adult is incapable if it is clear from the adult's responses that he or she does not understand the information and/or that the information applies to his or her situation.

A special set of guidelines for assessing incapability in the health care context has been prepared jointly by the Ministry of Health and the Public Guardian and Trustee. You will find these guidelines helpful. They are in Appendix E.

If you are not sure that the adult is incapable, you may decide that an in-depth assessment of incapability is required and make the appropriate referral. Alternatively, you may decide that because the adult's incapability has not been demonstrated, the adult is entitled to the benefit of the presumption of capability set out in the Act.

Whatever your decision, it will be important for you to record the observations that form the basis for your opinion.

6.2 Substitute Consent from a Representative or Committee of the Person (s. 11)

A health care provider must make every reasonable effort to get an adult's [capable] consent before seeking *substitute* consent. **This must occur even though the adult has, for example, a committee of the person or a representative**. However, health care may be given with *substitute* consent if:

- the health care provider has decided that the adult needs the health care and is incapable of giving or refusing consent, and,
- the adult's representative or committee of the person:
  (a) has the authority to make the particular health care decision;
  (b) is capable of making the decision or decisions; and
  (c) gives substitute consent.

To find out if the adult has a representative or a committee of the person, a health care provider should ask the adult, contact the adult's family and friends or, in the case of a committee of the person, the Public Guardian and Trustee. If the adult has both a representative and a committee of the person, the committee "trumps" the representative, and the committee should be asked to make the decision, not the representative.

If a person is acting as the adult's representative he or she will be able to produce a copy of the Representation Agreement signed by the adult setting out the nature and scope of the representative's authority. The Agreement may also contain health care instructions or wishes that should guide the decisions being made by the representative. The health care provider responsible for treating the adult should ask to see the Agreement before obtaining substitute consent from the representative.

A person acting as a committee of the person should be able to produce a copy of the court order when asked.

6.3 If There is No Representative or Committee of the Person

If a health care provider wants to provide health care to an adult who is incapable of giving consent but who does **not** have a representative or committee of the person, the health care provider must follow certain procedures. The procedure to follow will depend upon whether the health care that is needed is 'major' or 'minor' health care.

Regardless of whether major or minor health care is needed, each procedure involves a process of, first, finding, and then, obtaining, substitute consent from a spouse or near relative of the adult (referred to as a "temporary substitute decision-maker"). If there is no one who can give substitute consent, the health care provider must then ask the Public Guardian and Trustee to authorize someone to make the decision.

6.4 Role of Advance Directives and Substitute Decision-Making

If a health care provider knows that there is an advance directive (AD), other than a representation agreement, with wishes/ instructions that apply to the health care situation at hand of which the substitute decision-maker may not be aware, the health care provider should draw the content of the AD to the attention of the substitute decision-maker.

The health care provider should also assure himself/herself that the substitute decision-maker is making the decision in accordance with the AD if it provides instructions applicable to the health care being proposed.

If a health care provider is of the opinion that a substitute decision-maker's decision is not in keeping with the instructions/wishes contained in the patient's AD and the health care provider is not able to resolve the matter, he or she should apply to the Review Board for a review of the substitute decision-maker's decision.

6.5 Defining Major & Minor Health Care

Providing health care without an adult's consent requires careful decision making. The complexity of the decision-making will vary with the seriousness of the health care being proposed. The legislation differentiates between major and minor health care. For major health care, the health care provider must wait 72 hours before proceeding with the treatment and advise the adult and those accompanying the adult of the right to request a review of the health care decision. Fewer steps are required when the health care is minor.

The Act provides the following definitions of major and minor health care:

Major Health Care	Minor Health Care
• **major surgery,** such as hip replacement, pacemaker insertion, or complete or partial organ removal, (bowel, kidney, lung, ovary, etc.); • **treatment involving a general anaesthetic;** • **major diagnostic or investigative procedures,** such as intravenous pyelogram, cystoscopy, angiogram or myelogram; amniocentesis, and scanning or imaging with use of contrast medium (isotope injection); • **radiation therapy;** • **intravenous chemotherapy;** • **laser surgery;** • **electroconvulsive therapy; and** • **kidney dialysis.**	**any health care that is not major health care,** such as removal of an ingrown toenail, immunizations, application of heat or cold and range of motion procedures, physical assessments, and administration of any oral medication including antibotics and psychiatric medications; **routine tests** such as those to determine if health care is necessary, including pap smears, MRI scans without injection, and blood tests, and **dental treatment**, such as cavity filling, oral surgery or extractions with a local anaesthetic, and oral hygiene inspections.

If you are not sure whether a particular procedure or other form of health care is major or minor, contact the Ministry of Health during regular working hours at (250) 952-1083.

6.6 Minor Health Care with the Consent of a Temporary Substitute Decision-Maker (s. 15)

The process for obtaining substitute consent from an adult's spouse or relative is simpler when the health care involved is minor.
As a health care provider, you may provide minor health care to an adult **without** the adult's consent if:

(i) you have determined that the adult is incapable of giving or refusing consent; **and,**
(ii) the adult **does not** have a representative or committee of the person who is authorized to consent, is capable of doing so, and, is available; **and,**

(iii) the adult's spouse or a relative, or someone authorized by the Public Guardian and Trustee gives consent to the minor health care, in their role as temporary substitute decision-maker.

All three conditions must be met before minor health care may be given without the adult's consent. When they are met, the treatment may be provided straight away.

See Appendix C for a flow chart setting out the process to follow in minor health care situations.

6.7 Major Health Care with the Consent of a Temporary Substitute Decision-Maker (s. 14)

A health care provider may provide major health care to an adult without the adult's consent **if**:

(i) the health care provider has complied with the duty to consult with the adult's family member or friend or anyone else with relevant information and with the adult in the process of determining that the adult needs the major health care and is incapable of giving or refusing consent; **and,**

(ii) the adult does not have a representative or committee of person who is authorized to consent, is capable of doing so, and is available; **and,**

(iii) the adult's spouse or a near relative, or someone authorized by the Public Guardian and Trustee, gives consent to the major health care, in their role as temporary substitute decision-maker; **and,**

(iv) the adult and any spouse, relative or friend who accompanies the adult have been informed (using Form 1.) of their right to have the temporary substitute decision-maker's decision reviewed by the Health Care and Care Facility Review Board, a **72 hour waiting period passes**, and no application is made to the Review Board.

All four conditions must be met before major health care may be given with substitute consent from a temporary substitute decision-maker.

See Appendix C for a flow chart setting out the process to follow in major health care situations.

6.8 Notification Requirements and the Right to Request a Review

A decision to give or refuse consent to health care can be reviewed by the Health Care and Care Facility Review Board.

The Board will only do so if someone who objects to a health care decision requests a review by the Board within 72 hours.

The health care provider must inform the adult and those accompanying the adult of the decision that the adult is mentally incapable of making the particular health care decision(s) as well as the name of the person chosen as temporary substitute decision-maker, and the proposed treatment. The adult must be informed in writing using a specified form in the Health Care Consent Regulation (Form 1).

Information about the right to request a review is contained in a brochure that explains the Board and its functions. A copy of the brochure is in Appendix F. The brochure can be downloaded from the Ministry's web site. Multiple copies of the brochure can be obtained from the Ministry of Health.

It is suggested that the health care provider meet with the adult (to the greatest extent possible), as well as any concerned family members and friends, at the earliest opportunity. Issues such as the need for the health care and the need for someone to make a substitute decision for the adult can then be raised and resolved collaboratively. It might be possible, for example, to collectively agree upon the best person to take on the role of temporary substitute decision-maker and to determine whether the adult had particular, pre-expressed and firmly held views about treatment. Should disagreements arise, they can be dealt with collectively and at an early stage, or resolved through the kinds of dispute resolution mechanisms already available to staff, adults and adults' families at some hospitals. This collaborative process should reduce the need for disagreements about the provision of health care to be referred to the Health Care and Care Facility Review Board for resolution.

6.9 Dealing With Disputes That Cannot Be Resolved

Adults who are mentally incapable of making a particular health care decision may, nevertheless, object to receiving the proposed health care. They may physically resist treatment that needs to be provided. There may be a dispute about the major health care among the relatives and friends accompanying the adult that cannot be resolved by collective discussions or available dispute resolution mechanisms.

If there is a dispute between two equally ranked and qualified near relatives over who is to be chosen to serve as the temporary substitute decision-maker, and the dispute cannot be resolved, the

health care provider may ask the Public Guardian and Trustee to assist. The Public Guardian and Trustee will, if necessary, appoint a TSDM if the dispute is about who is to be chosen. The adult may then receive the health care he or she needs **unless** the authorized person refuses to give consent, or someone asks the Health Care and Care Facility Review Board to review the decision (See, 6.0 below).

6.10 Health Care is Delayed Pending Review

If a review is initiated, health care must not be provided until a final decision is made by the Health Care and Care Facility Review Board (s. 14 (7)).

NOTE THAT IF THE ADULT REQUIRES URGENT OR EMERGENCY HEALTH CARE AT ANY TIME DURING THE PROCESS OF OBTAINING SUBSTITUTE CONSENT, INCLUDING THE 72 HOUR WAITING PERIOD, THE HEALTH CARE MAY BE GIVEN WITHOUT DELAY (s. 14(8)).

6.11 A Temporary Substitute Decision-Maker is Not a New Thing

Choosing a temporary substitute decision-maker is largely a formalization of what is now common practice. A spouse or relative is asked to consent if the adult is incapable.

What is new is that health care providers will not need to continue the practice (followed by some) of asking another health care provider or an administrator to give a substitute consent for an incapable adult when there is no available near relative. As well, there will be fewer occasions when it will be necessary to go to court to obtain a legal decision or appoint Committee of Person. As described below, when there is no near relative or other authorized person, health care providers must ask the Public Guardian and Trustee to authorize someone to act as the temporary substitute decision-maker.

6.12 Who Will Be Chosen (s. 16(1))

A **'spouse'** is defined as the person who is married to the adult or who lives with the adult in a marriage-like relationship ("common law"), including same sex relationships.

The health care provider must choose the first of these, who is available and qualifies:

- the adult's spouse
- the adult's child
- the adult's parent
- the adult's brother or sister, or
- anyone else related to the adult by birth or adoption(s.16(I1))

In the case of a married person who is separated but in a "common law" relationship, the common law spouse should be selected. The term "spouse" includes a person of the same sex who is living with the adult in a marriage-like relationship.

6.13 Qualifications of a Temporary Substitute Decision-Maker (s. 16(2))

To qualify as a temporary substitute decision-maker, a person must:

- be at least 19 years of age;
- have been in contact with the adult during the preceding 12 months;
- have no dispute with the adult (e.g., that is, not have major differences of opinion about treatment or be in conflict as a result of a family feud);
- be capable of giving, refusing or revoking substitute consent; and,
- be willing to comply with the duties of a temporary substitute decision-maker (see, 7.0 below).

There are some kinds of health care a temporary substitute decision-maker cannot give substitute consent for. (See 7.4 below for details.)

6.14 Finding a Family Member to Act as a Temporary Substitute Decision-Maker

The health care provider is not required to do more than make a reasonable effort in the circumstances to determine if there is a spouse or relative who could serve as temporary substitute decision-maker, before contacting the Public Guardian and Trustee (s. 16(4)). Information about relatives may be found through friends, in a wallet or purse, neighbours, internet resources, etc.

6.15 What is a Reasonable Effort?

The effort required to find a temporary substitute decision-maker will depend upon the specific situation. Available time, resources and the urgency of the situation must all be considered.

- If a qualified person does not accompany the adult, it may be necessary to make telephone calls, confer with a friend of the adult, or use other means, depending on the circumstances.

- If a person on the list refuses to be a temporary substitute decision-maker or shows little interest in being one, the health care provider would move to the next person on the list who is available and qualifies.

- As mentioned earlier (See 6.8 above), family members may have met and decided amongst themselves who would be the most appropriate temporary substitute decision-maker. A family member higher on the list than another family member may, by informal agreement within the family group, decline to act in favour of the person below them on the list, if it is thought that this person would be a better decision-maker.

- If two or more equally ranked and qualified family members disagree about who should be the temporary substitute decision-maker, the health care provider is expected to make a reasonable effort to obtain agreement about who will act as the temporary substitute decision-maker. If agreement cannot be obtained, the Public Guardian and Trustee will authorize someone.

- A health care provider must not work down the list to find someone who will give consent because the others higher on the list have refused the proposed treatment.

6.16 When There is No Family Member to Make The Decision (s. 16 (3))

There may be cases where incapable adults require treatment but there is no one who can make decisions for them.

If there is no spouse or relative available to act as a temporary substitute decision-maker, the health care provider must notify the Public Guardian and Trustee. **Health care providers cannot ask another health care provider to make the decision on the adult's behalf.**

The Public Guardian and Trustee will look into the situation and may:

- choose a friend, a relative by marriage, or a member of the adult's support network to act as decision-maker, or
- make the decision.

To contact the Health Care Decisions Team with the Public Guardian and Trustee call: In the Lower Mainland: 775-0775; outside the local Vancouver calling area call: 1-877-511-4111. The hours of service are Monday to Friday, 8:00 a.m. - 6:00 p.m. and 8:00 a.m. to 12:00 noon on Saturdays, Sundays and holidays.

7.0 THE POWERS AND DUTIES OF A TEMPORARY SUBSTITUTE DECISION-MAKER

7.1 The Duration of a Temporary Substitute Decision-Maker's Authority (s. 17 (1) & (2))

A temporary substitute decision-maker's authority to give or refuse consent to health care for the adult lasts for 21 days from the date of being chosen.

If the health care continues beyond the 21 days the consent will still be valid, as long as the care begins before the 21 day period ends. For example, a temporary substitute decision-maker may consent to a course of chemotherapy for an adult. The treatment begins on day two after the temporary substitute decision-maker is chosen, and continues for six weeks. The consent to that treatment, given by the temporary substitute decision maker, is in effect for a total of 42 days.

If consent is given, but the health care does not begin within the 21 day period, a new consent must be obtained when the treatment is to begin. This may occur in elective surgery situations where consent is provided when the adult is placed on a waiting list, and then later renewed when the adult is called and admitted for surgery.

A temporary substitute decision-maker may, for personal or other reasons, ask to be relieved of the responsibility for making health care decisions. The health care provider may then choose another person to assume that responsibility for the remainder of the 21 day period. (That choice must conform to the Act's order of selection set out in this guide at 6.2.)

7.2 Making a Health Care Decision on Behalf of Another

Substitute decisions about health care are often complex and can present ethical dilemmas for family, friends and anyone else who must make them. The Act provides a decision-making hierarchy to assist temporary substitute decision-makers.

1) Decision-makers must consult with the adult to the greatest extent possible. **If the temporary substitute decision-maker is a person authorized by the Public Guardian and Trustee**, the person must also consult with any family members or friends who offer their assistance. Temporary substitute decision-makers must comply with any instructions or wishes expressed orally, or in writing, by the adult while he or she was capable.

Pre-Expressed Wishes

Instructions or wishes expressed when capable and that apply to the treatment decision, are binding on the substitute decision-maker. These instructions may have been verbal or written. It does not matter whether these instructions or wishes were made before 28 February 2000. What does matter is that the instructions or wishes be the adult's, expressed when capable, not those of a relative or health care provider.

Generally speaking, **any** written instructions or expressions of the adult's wishes with respect to health care should be followed by the substitute decision-makers in the absence of some clear reason to ignore them. Doubts might arise if the wishes were written some time previously and are clearly at odds with the adult's recent capable but verbally expressed wishes. For example, the adult when capable may have adopted a new faith, the beliefs of which differ from previously expressed viewpoints on treatment.

2) If the adult's instructions or wishes are unknown, the decision must be made on the basis of what is known about the adult's values and beliefs (sometimes called a "substituted judgment").

3) If the adult's values and beliefs are not known, the decision must be made in the adult's best interests.

When making a 'best interests' decision, the Act requires that a decision-maker must consider:

- the adult's current wishes;
- whether the adult's condition or well-being is likely to be improved by the proposed health care;

- whether the adult's condition or well-being is likely to improve without the proposed health care;
- whether the benefit the adult is expected to obtain from the proposed health care is greater than the risk of harm; and,
- whether a less restrictive or less intrusive form of health care would be as beneficial as the proposed health care, including having no health care.

Safeguards are built into the process. A Health Care and Care Facility Review Board can, if asked, review the health care decisions that are made by temporary substitute decision-makers. (See 8.0 below)

7.3 Access to Information (s. 17 (6)-(8)

A temporary substitute decision-maker has the right to all information necessary to give or refuse consent to the proposed health care. This **does not** include access to **all** health information about the adult, **only** information that is specific to the proposed health care. This would include information about the condition for which the health care is proposed; the associated risks and benefits; and alternatives to the health care.

Anyone who has the necessary information must disclose it to the temporary substitute decision-maker. This overrides any restrictions on disclosure under the *Freedom of Information and Protection of Privacy Act*.

Access to information for the purposes of health care consent also overrides any claim of confidentiality or privilege, except for solicitor/client privilege.

7.4 Restrictions on the Temporary Substitute Decision-Maker's Authority to Make Health Care Decisions (s. 18 (1))

A temporary substitute decision-maker does not have authority to give consent to all types of health care. Section 5 of the *Health Care Consent Regulation* specifies the forms of health care that are beyond the authority of a temporary substitute decision-maker. These are:

- abortion unless recommended in writing by the treating physician and at least one other medical practitioner who has examined the adult for whom it is proposed;

- electroconvulsive therapy unless recommended in writing by the treating physician and at least one other medical practitioner who has examined the adult for whom it is proposed;
- psychosurgery;
- removal of human tissue from a living body for implantation in another human body or for medical education or research;
- experimental health care (if the risks are not outweighed by the benefits to the patient);
- participation in a health care or medical research program not approved by an research ethics committee designated under the Health Care Consent Regulation; (see, Appendix B for a list of these ethics committees); and
- any treatment, procedure or therapy that involves using aversive stimuli to induce a change in behaviour.

The above health care **may** be consented to by a representative or a committee of person, **but only if they are specifically authorized** to make such decisions in a (section 9) Representation Agreement or court order.

Note: **The health care provider must immediately notify the Community Legal Assistance Society (CLAS) after a temporary substitute decision-maker has made a decision to give consent to abortion or electroconvulsive therapy that has been recommended in writing by two physicians.**

The Community Legal Assistance Society may be contacted during working regular working hours by phoning (604) 685-3425 and at any time by faxing (604) 685-7611.

In addition to the list of "restricted" health care above, sterilization causing permanent inability to reproduce that is not medically necessary to preserve the adult's health is prohibited for **all** substitute decision-makers by a ruling of the Supreme Court of Canada.

7.5 Refusal of Life Support (s. 18 (2))

The term **'substantial agreement'** implies that there has been consultation and a high degree of consensus among all members of the health care team.

A temporary substitute decision-maker may refuse consent to health care necessary to preserve life, but only if:

- there is substantial agreement among the health care providers caring for the adult that the decision to refuse consent is medically appropriate; and,
- the temporary substitute decision-maker has made the decision on the basis of the adult's pre-expressed wishes (for example, the contents of a living will) or, if these are not known, on the basis of the adult's known values and beliefs. If a temporary substitute decision maker does not know the adult's pre-expressed wishes or the adult's values and beliefs, a temporary substitute decision maker **cannot** make a decision to refuse consent to health care necessary to preserve life based on best interests.

If any person involved in a decision about the refusal of health care necessary to preserve life does not agree with the decision, that person may apply to the Review Board for a review.

8.0 THE HEALTH CARE AND CARE FACILITY REVIEW BOARD

The Review Board provides a mechanism for reviewing health care decisions, at the request of either the adult involved, someone acting on the adult's behalf, or a health care provider. The Review Board sits as a panel of three members, a lawyer (who must be a member of the Law Society of BC), a health care provider and a person who is neither a lawyer or a health care provider.

The Review Board has the authority to convene a hearing, receive submissions made by the parties, and make decisions. The Board will have Panels consisting of three members appointed by the Minister of Health, a health care provider, a lawyer, and a person who is neither a health care provider nor a lawyer. (s. 27)

8.1 What Decision Can the Review Board Review? (s. 28(1))

A request may be made for a review of a temporary substitute decision-maker's decision to give, refuse or revoke substitute consent to health care.

8.2 Who Can Request a Review? (s. 28 (2))

Any of the following may request a review:

- an adult for whom health care is being proposed, or someone acting on the adult's behalf such as their legal counsel;
- the adult's spouse, relative or friend (for example, a relative who

did not make the decision because it was made by a nearer relative);

- the adult's representative or committee (for example, in situations where the adult has one of these types of decision-maker but the person does not have the authority to make substitute health care decisions for the adult and a temporary substitute decision-maker has made the decision);
- the Public Guardian and Trustee;
- the health care provider providing health care to the adult (for example, where the substitute decision-makers refuse consent and the health care provider believes the decision was not made in accordance with the Act);
- A prescribed advocacy organization in prescribed circumstances. (These circumstances are when a decision to give consent to abortion or electroconvulsive therapy decision is made by a temporary substitute decision maker.) The Community Legal Assistance Society based in Vancouver has been designated as the prescribed advocacy organization by the Health Care Consent Regulation.

8.3 How to Request a Hearing (s. 28 (3), (4) & (5))

A request must be in writing, using Form 2. It must be received by the Review Board within 72 hours of the temporary substitute decision-maker's decision.

The address and fax number of the Review Board are set out in Form 2, (see Appendix B).

8.4 The Rights of a Party to a Review Board Hearing (s. 28 (6) & 29)

The hearing must occur within 7 calendar days (as defined in the *Interpretation Act*) after the Review Board receives the request.

The Review Board must give the parties to the review written notice of the request for a hearing. This notice will include the date, time and location of the hearing.

8.5 Who are the Parties to a Review?

The parties to a review are:

- the person who requested the review;
- the adult for whom health care is proposed or provided;

- the health care provider, but only if it is the health care provider who requests the review.

Each party can be represented by a lawyer or by an "agent". This means that an adult can attend with a lawyer, para-legal, family member or friend, or one of these individuals can appear on the adult's behalf. If the Review Board is of the opinion that the adult needs assistance at the hearing it may inform the Community Legal Assistance Society.

Each party will be given an opportunity to examine and copy those parts of any document or electronic recording that another party intends to introduce as evidence at the hearing. A party is entitled to present any evidence that the Board considers relevant and to question witnesses. The Board also has the power to summon witnesses to a hearing.

8.6 What the Board Can Do After a Hearing (s. 30)

After the hearing, the Board can confirm the original decision or substitute its own. If it substitutes its own decision, the Board must follow the rules for temporary substitute decision-makers set out in the Act, including the obligation to try to consult with the adult and to respect the adult's wishes, values and beliefs.

The Board's decision and the reasons for the decision must be given in writing. A copy must be given to all parties. If the Board approves the provision of health care to the adult, the health care may be given immediately, unless the Board's decision is appealed to the Supreme Court.

8.7 Appealing a Review Board Decision (s. 32)

A party may appeal a decision of a Review Board to the Supreme Court within 30 days after the decision is made. If an appeal is made, the health care cannot be provided and the decision that was under review by the Board (e.g., the original decision to provide treatment) stands until the Court reaches a decision. If a party applies, the Court may make an interim order authorizing health care to be given to the adult if the health care is necessary to prevent physical or mental harm.

IF THE ADULT REQUIRES URGENT OR EMERGENCY HEALTH CARE DURING THIS PROCESS, THE HEALTH CARE MAY BE GIVEN WITHOUT DELAY (s. 14 (8)).

APPENDIX A

Form 1. – Notice of Incapability and Substitute Consent (Major Health Care)

Form 2. - Request for a Review

APPENDIX B

Designated Research Ethics Committees

APPENDIX C

Flow Chart – Urgent and Emergency Health Care

Flow Chart - Minor Health Care

Flow Chart - Major Health Care

APPENDIX D List of Health Care Providers

APPENDIX E Determining Incapability to Consent to Health Care

APPENDIX F Brochures Related to Health Care Consent and the Review Board

APPENDIX A

Form 1. – Notice of Incapability and Substitute Consent (Major Health Care)

Form 2. - Request for a Review

BRITISH COLUMBIA
Ministry of Health and
Ministry Responsible for Seniors

FORM 1
HEALTH CARE (CONSENT) AND CARE FACILITY (ADMISSION)ACT
Section 14 (4) (b) of the Act

NOTICE OF INCAPABILITY AND SUBSTITUTE CONSENT (MAJOR HEALTH CARE)

To: _____
name of adult for whom substitute consent has been given (please print)

I, _____,
name of health care provider (please print)

am your physician/other health care provider and I have proposed the following health care for you:

_____

_____

_____

_____

I have determined, using the legal test of incapability stated in section 7 of the *Health Care (Consent) and Care Facility (Admission) Act*, that you are incapable of giving or refusing consent to the health care described above.

To the best of my knowledge, you do not have a committee, or representative, who is authorized to make a decision for you about the health care described above.

Therefore, I have chosen _____
name and phone number of Temporary Substitute Decision Maker (please print)

and he/she has ☐ given ☐ refused *(check ONE box only)* substitute consent to the health care described above.

You, your spouse or a relative or friend of yours has the right to request a review of the decision to give or refuse substitute consent for the health care described above. A request for a review must be delivered to the Health Care and Care Facility Review Board within 72 hours after the decision to give or refuse substitute consent for the health care described above was made. The request must be delivered to:

Registrar, Health Care and Care Facility Review Board
Unit 6, 500 Lougheed Highway
Port Coquitlam, British Columbia, V3C 4J2
Tel: 604-524-7219 or 604-524-7220 Fax: 604-524-7216

The decision to ☐ give ☐ refuse *(check ONE box only)* substitute consent to the health care described above

was made on: _____ at _____ am / pm.
date (dd / mm / yyyy) *time*

_____ _____
signature of care provider *position / title*

_____ _____ am / pm.
date (dd / mm / yyyy) *time*

BRITISH COLUMBIA
Ministry of Health and
Ministry Responsible for Seniors

FORM 2
HEALTH CARE (CONSENT) AND CARE FACILITY (ADMISSION)ACT
Section 28 of the Act

REQUEST FOR REVIEW

Personal information on this form is collected under the authority of the *Health Care (Consent) and Care Facility (Admission) Act [Section 28]*. The information will be used to request a review of the temporary substitute decision maker's consent decision to the Health Care and Care Facility Review Board. If you have any questions about the collection of this information contact the Registrar, Health Care and Care Facility Review Board,Unit 6, 500 Lougheed Highway,Port Coquitlam, British Columbia, V3C 4J2. Phone: 604-524-7219 or 604-524-7220. Personal information will be used and disclosed in accordance with the provisions of the *Freedom of Information and Protection of Privacy Act* .

I am requesting a review of the decision made on _____ at _____ am/pm
date (dd / mm / yyyy) *time*

by _____ to ☐ give *(check ONE box only)*
name of substitute decision maker ☐ refuse
☐ revoke

substitute consent to the following health care:

_____

_____

_____

This health care is ☐ being provided by _____
name of health care provider
☐ proposed by
(check ONE box only)

for _____
name of adult to whom health care is being provided / is proposed

In summary, the reasons for requesting a review are as follows:

_____

_____

_____

_____

APPLICANT INFORMATION

_____
name

_____
relationship to adult who is subject of this request

_____
address

_____
city *province* *postal code*

_____ _____
telephone *fax*

ADULT INFORMATION

_____
name

_____
facility in which adult is currently located, if applicable

_____
address

_____
city *province* *postal code*

_____ _____
telephone *fax*

HEALTH CARE PROVIDER INFORMATION

_____
name

_____
title/position/occupation

_____
address

_____
city *province* *postal code*

_____ _____
telephone *fax*

SUBSTITUTE DECISION MAKER INFORMATION

_____
name

_____
title/position/occupation

_____
relationship to adult who is subject of this request

_____
address

_____
city *province* *postal code*

_____ _____
telephone *fax*

This request must be delivered to the Board within 72 hours after the decision to be reviewed is made, or the Board may not be able to consider your request. The request must be delivered to:

Registrar, Health Care and Care Facility Review Board
Unit 6, 500 Lougheed Highway
Port Coquitlam, British Columbia, V3C 4J2

Tel: 604-524-7219 or 604-524-7220 Fax: 604-524-7216

The Board must hold a hearing within 7 days of receiving a request for review. Please answer the following questions:

Where would you like the hearing to be held? _____

Do you need a translator? ❒ yes ❒ no *(circle one)*

Are you being represented by legal counsel? If yes, please complete the following;

_____
name of legal counsel

_____
address

_____
city *province* *postal code*

_____ _____
telephone *fax*

The Board must inquire fully into the circumstances of your case. Please send the Registrar copies of all documents you intend to rely on at least 24 hours before the hearing.

_____ _____ _____ am/pm.
signature of applicant *date (dd / mm / yyyy)* *time*

APPENDIX B

Designated Research Ethics Committees that may approve medical research programs:

(a) BC Cancer Agency Clinical Investigations Committee;
(b) University of British Columbia Clinical Research Ethics Board;
(c) University of British Columbia Behavioural Research Ethics Board;
(d) Simon Fraser University Research Ethics Review Committee;
(e) University of Victoria Human Research Ethics Committee;
(f) St. Paul's Hospital Ethics Committee for Human Experimentation;
(g) Capital Health Region Research Review and Ethical Approval Committee;
(h) Simon Fraser Health Region Clinical Investigations Committee;
(i) Kelowna General Hospital Research Committee;
(j) Prince George Regional Hospital Research Review Committee;
(k) Penticton Regional Hospital Ethics Committee;
(l) North Okanagan Health Region Research Committee.

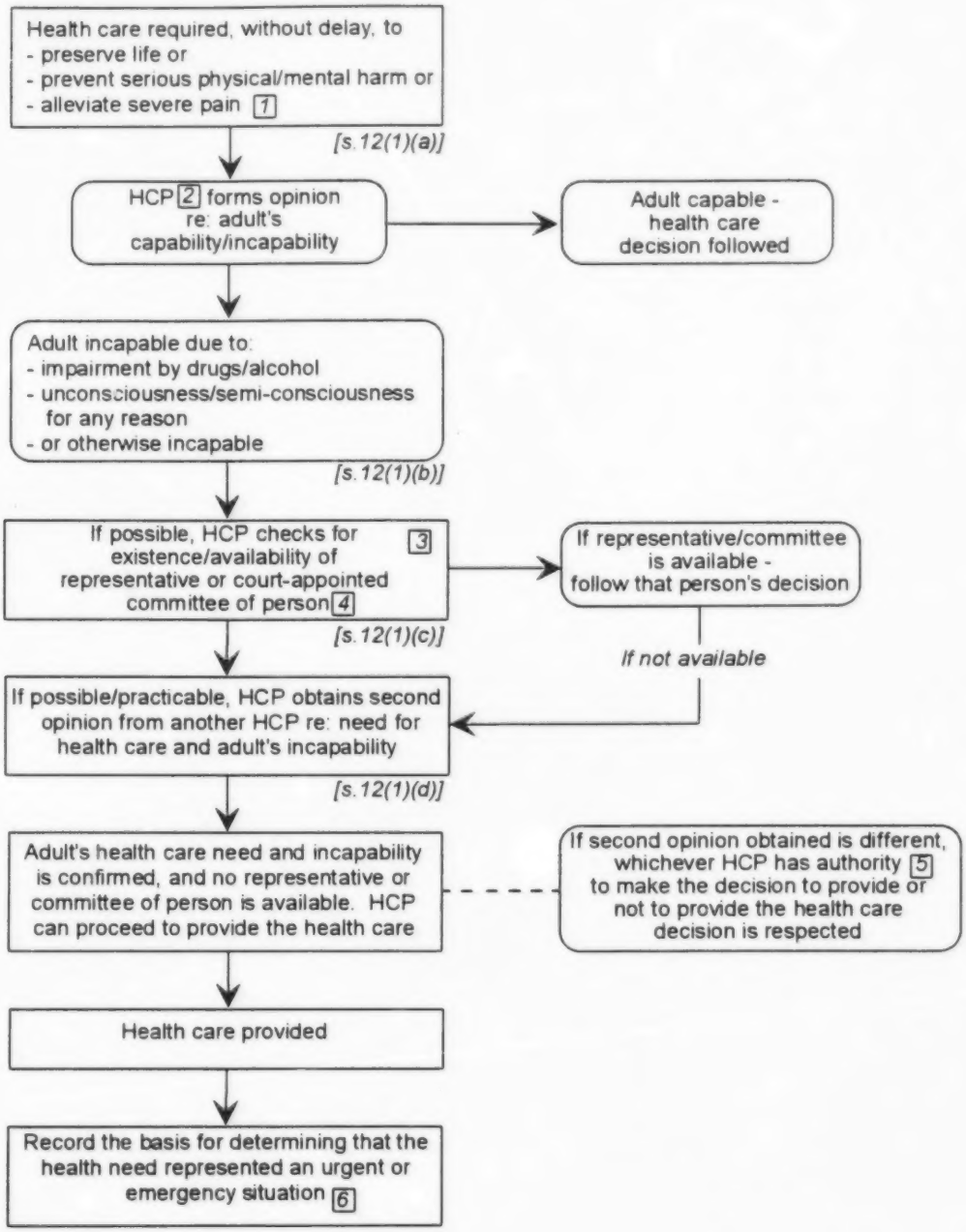
APPENDIX C

FLOW CHART – URGENT AND EMERGENCY HEALTH CARE

FLOW CHART – MINOR HEALTH CARE

FLOW CHART – MAJOR HEALTH CARE

APPENDIX C: CONSENT IN **URGENT OR EMERGENCY HEALTH CARE** SITUATIONS


Health care required, without delay, to
- preserve life or
- prevent serious physical/mental harm or
- alleviate severe pain [1]
[s.12(1)(a)]
HCP [2] forms opinion re: adult's capability/incapability
Adult capable - health care decision followed
Adult incapable due to:
- impairment by drugs/alcohol
- unconsciousness/semi-consciousness for any reason
- or otherwise incapable
[s.12(1)(b)]
If possible, HCP checks for existence/availability of representative or court-appointed committee of person [4] [3]
[s.12(1)(c)]
If representative/committee is available - follow that person's decision
If not available
If possible/practicable, HCP obtains second opinion from another HCP re: need for health care and adult's incapability
[s.12(1)(d)]
Adult's health care need and incapability is confirmed, and no representative or committee of person is available. HCP can proceed to provide the health care
If second opinion obtained is different, whichever HCP has authority [5] to make the decision to provide or not to provide the health care decision is respected
Health care provided
Record the basis for determining that the health need represented an urgent or emergency situation [6]

[1] = *Pain that is so severe that the adult is unable to give a valid consent*

[2] = *Health Care Provider*

[3] = *If it is possible within a time that is reasonable to:*
1. *determine if the adult has a committee of person/representative, and*
2. *communicate with that person [s.12(2)(a)(c)]*

[4] = *a person appointed by the court under the Patients Property Act*

[5] = *In practice, this will usually be "the most responsible physician"*

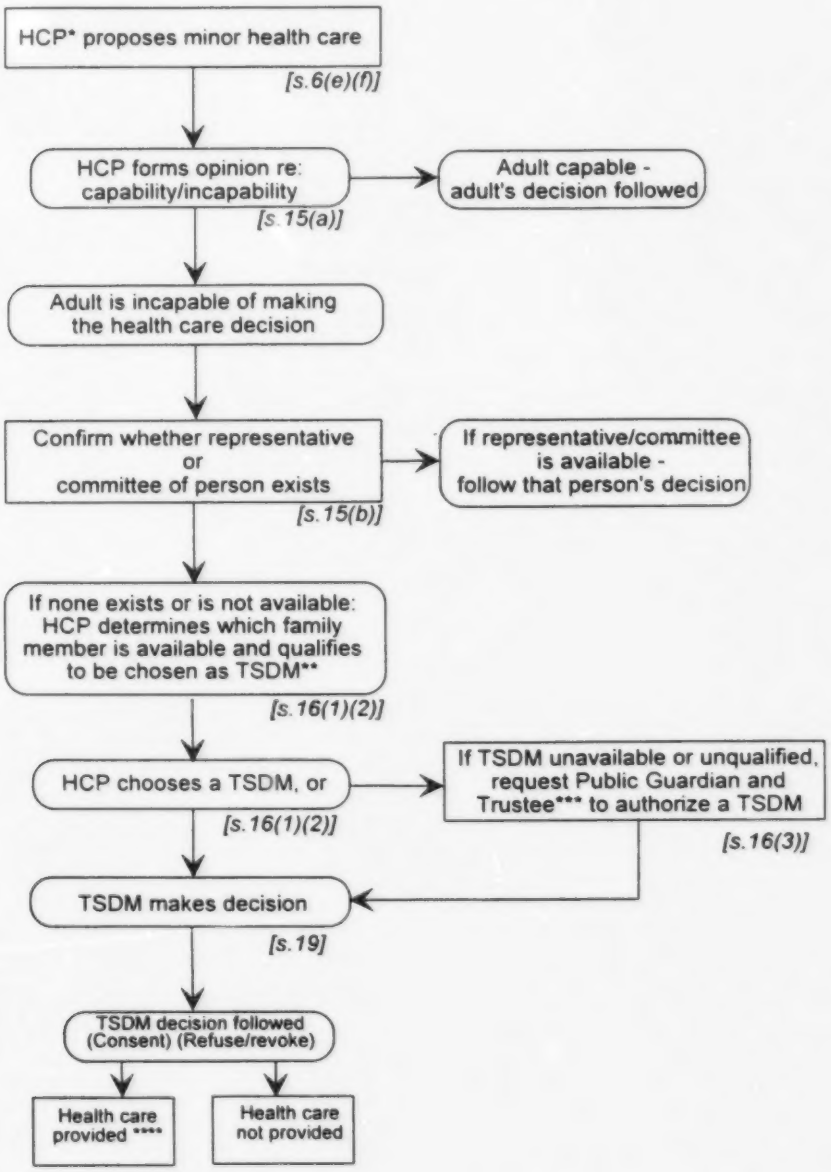
[6] = *Not required under the Act, but recommended as good practice, and for quality assurance, and potential legal purposes*

[ ] Refer to Act

Action

Decision

APPENDIX C: CONSENT IN **MINOR HEALTH CARE** FOR INCAPABLE ADULTS


HCP* proposes minor health care
[s.6(e)(f)]
HCP forms opinion re: capability/incapability
[s.15(a)]
Adult capable - adult's decision followed
Adult is incapable of making the health care decision
Confirm whether representative or committee of person exists
[s.15(b)]
If representative/committee is available - follow that person's decision
If none exists or is not available: HCP determines which family member is available and qualifies to be chosen as TSDM**
[s.16(1)(2)]
HCP chooses a TSDM, or
[s.16(1)(2)]
If TSDM unavailable or unqualified, request Public Guardian and Trustee*** to authorize a TSDM
[s.16(3)]
TSDM makes decision
[s.19]
TSDM decision followed (Consent) (Refuse/revoke)
Health care provided ****
Health care not provided

HCP* = *Health Care Provider*

TSDM** = *Temporary Substitute Decision Maker chosen by the HCP (spouse, child, parent, brother or sister, or anyone else related by birth or adoption to the adult) or person authorized by the Public Guardian and Trustee [s. 16]*

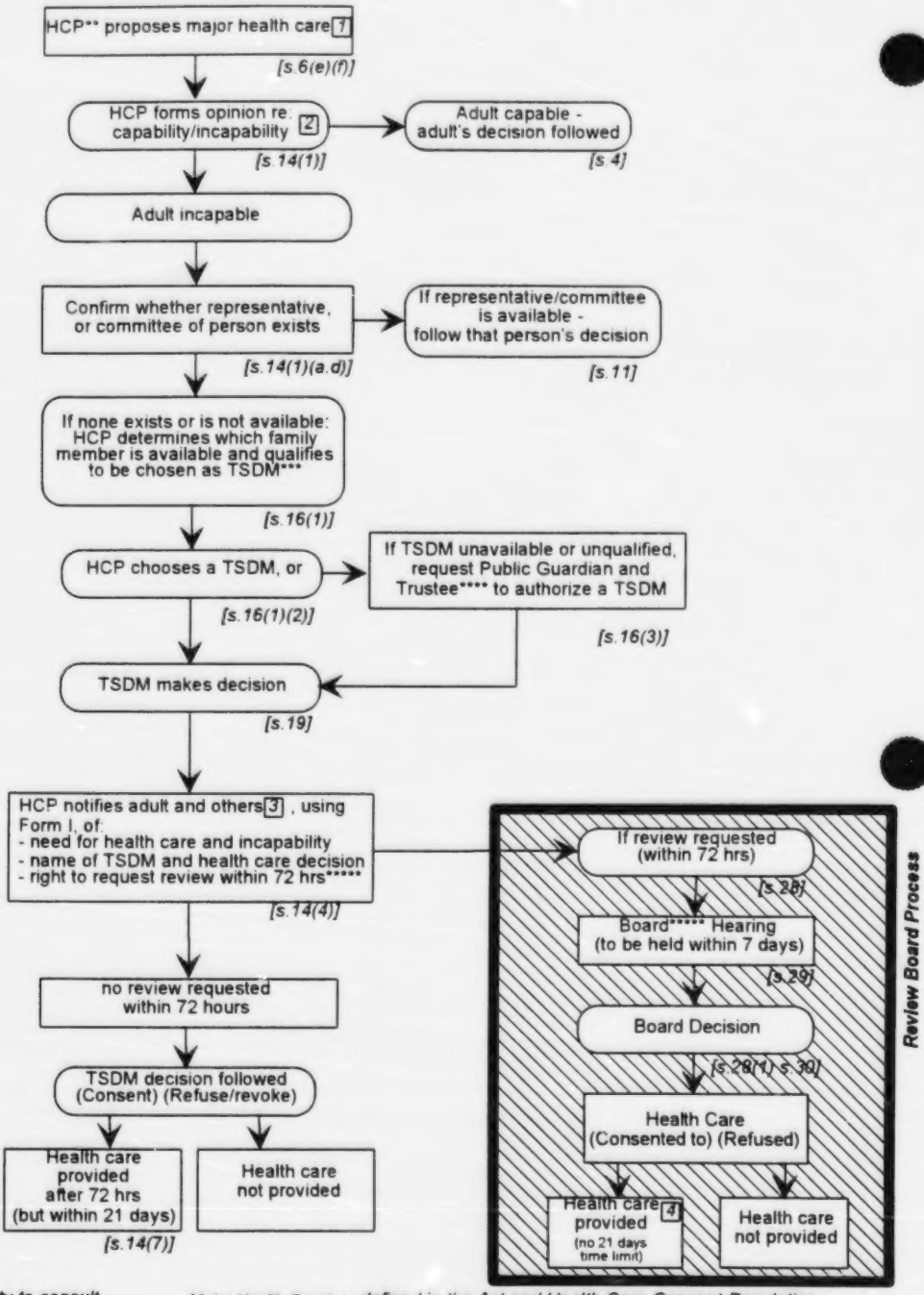
*** = *To contact the Health Care Decisions Team with the Public Guardian and Trustee call: In the Lower Mainland: 775-0775; outside the local Vancouver calling area call: 1-877-511-4111. The hours of service are Monday to Friday, 8:00 a.m. - 6:00 p.m. and 8:00 a.m. to 12:00 noon on Saturdays, Sundays and holidays.*

**** = *The health care can be provided immediately. (There is no 72 hour waiting period when a TSDM gives consent for minor health care).*

[ ] Refer to Act ▭ Action ⬭ Decision

APPENDIX C: CONSENT IN **MAJOR HEALTH CARE*** FOR INCAPABLE ADULTS

[ss 14 and 16]


HCP** proposes major health care [1]
[s.6(e)(f)]
HCP forms opinion re: capability/incapability [2]
[s.14(1)]
Adult capable - adult's decision followed
[s.4]
Adult incapable
Confirm whether representative, or committee of person exists
[s.14(1)(a.d)]
If representative/committee is available - follow that person's decision
[s.11]
If none exists or is not available: HCP determines which family member is available and qualifies to be chosen as TSDM***
[s.16(1)]
HCP chooses a TSDM, or
[s.16(1)(2)]
If TSDM unavailable or unqualified, request Public Guardian and Trustee**** to authorize a TSDM
[s.16(3)]
TSDM makes decision
[s.19]
HCP notifies adult and others [3], using Form I, of:
- need for health care and incapability
- name of TSDM and health care decision
- right to request review within 72 hrs*****
[s.14(4)]
no review requested within 72 hours
TSDM decision followed (Consent) (Refuse/revoke)
Health care provided after 72 hrs (but within 21 days)
[s.14(7)]
Health care not provided
Review Board Process
If review requested (within 72 hrs)
[s.28]
Board***** Hearing (to be held within 7 days)
[s.29]
Board Decision
[s.28(1) s.30]
Health Care (Consented to) (Refused)
Health care provided [4] (no 21 days time limit)
Health care not provided

[1] = *The health care provider has a duty to consult with the adult's spouse, relative or friend or with any other person who has relevant information before deciding that the adult needs major health care and is incapable*

[2] = *If adult is apparently incapable, conduct assessment of incapability using MOH incapability assessment guidelines*

[3] = *Others are: "... any spouse, relative or friend who accompanies the adult."*

[4] = *The health care may be provided unless there is an appeal to the court [s.32]*

Major Health Care* = *defined in the Act and Health Care Consent Regulation*

HCP** = *Health Care Provider (anyone who, under a prescribed Act, is licensed, certified, or registered to provide health care)*

TSDM*** = *Temporary Substitute Decision Maker chosen by the HCP (spouse, child, parent, brother or sister, or anyone else related by birth or adoption to the adult) or person authorized by the Public Guardian and Trustee*

**** = *To contact the Health Care Decisions Team with the Public Guardian and Trustee call: In the Lower Mainland: 775-0 outside the local Vancouver calling area call: 1-877-511-4111. The hours of service are Monday to Friday, 8:00 a.m. - 6:00 p.m. and 8:00 a.m. to 12:00 noon on Saturdays, Sundays and holidays.*

***** = *Health Care and Care Facility Review Board, fax: (604) 524-7216*

[ ] Refer to Act ▭ Action ⬭ Decision

APPENDIX D: REGULATED HEALTH PROFESSIONS

STATUTE	PRACTITIONERS	REGULATORY BODY
Chiropractors Act	Chiropractors	British Columbia College of Chiropractors.
Dentists Act	Dentists Dental Assistants	College of Dental Surgeons of BC
Health Professions Act	Acupuncturists	College of Acupuncturists of BC
	Dental Technicians	College of Dental Technicians of BC
	Dental Hygienists	College of Dental Hygienists of BC
	Denturists	College of Denturists of BC
	Licensed Practical Nurses	College of Licensed Practical Nurses of BC
	Massage Therapists	College of Massage Therapists of BC
	Midwives	College of Midwives of BC
	Occupational Therapists	College of Occupational Therapists of BC
	Opticians	College of Opticians of BC
	Physical Therapists	College of Physical Therapists of BC
	Registered Psychiatric Nurses	College of Registered Psychiatric Nurses of BC
Hearing Aid Act	Audiologists (private practice) Hearing Aid Dealers	Board of Hearing Aid Dealers and Consultants
Medical Practitioners Act	Physicians Osteopaths	College of Physicians and Surgeons of BC
Naturopaths Act	Naturopaths	Association of Naturopathic Physicians of BC
Nurses (Registered) Act	Registered Nurses	Registered Nurses Association of BC
Optometrists Act	Optometrists	Board of Examiners in Optometry
Podiatrists Act	Podiatrists	Board of Examiners in Podiatry
Psychologists Act	Psychologists	College of Psychologists in BC
Social Workers Act	Social Workers	BC Association of Social Workers

Appendix E

Practice Guidelines for Determining Incapability to Consent to Health Care

Under the Health Care (Consent) and Care Facility (Admission Act)

February 15th, 2000

Ministry of Health and Ministry Responsible for Seniors
Public Guardian and Trustee of British Columbia

Acknowledgments:

This document was developed by the Incapability Assessment Steering Committee in collaboration with the Ministry of Health and Ministry Responsible for Seniors and the Public Guardian and Trustee of BC.

We wish to thank the many individuals and organizations who participated in the development of this document through consultation forums and written feedback.

The Incapability Assessment Steering Committee is a joint community-government initiative. Members of the committee are:

Norma Collier
B.C. Association for Community Living

Andrew Kellett
Surrey Central Community Mental Health Advisory Council

Patti Flaherty
Vancouver Hospital and Health Sciences Center; GF Strong Center

Barbara Lindsay
Alzheimer Society of B.C.

Dr. Stephen Kline
St. Paul's Hospital

Giuseppe Scaletta
Capital Health Region

Dr. Patricia Rebbeck
B.C. College of Physicians and Surgeons

Dr. Kathleen Carter
Physician

Pieter de Groot
Guardianship Implementation
Ministry of Health

Aida Davis
Services to Adults
Public Trustee of B.C.

Linda Derkach
Guardianship Implementation
Public Trustee of B.C.

Alison Leaney
Guardianship Implementation
Public Trustee of B.C.

Professor Robert Gordon
Simon Fraser University

Bobbi Noble
Facilitator

For more information, write, call or fax:

Manager, Adult Guardianship
Ministry of Health and Ministry for Seniors
5-2 1515 Blanshard Street, Victoria, B.C. V9W 3C8
Phone: 250-952-1083 Fax: 250-952-2205
e-mail: pieter.degroot@moh.hnet.bc.ca

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1. *Using the Practice Guidelines*

1. What Are These Practice Guidelines About?

These practice guidelines describe the process of determining whether an adult (a person 19 years of age and over) is incapable of making decisions about their health care.

These practice guidelines are intended to be used in conjunction with the Health Care Providers Guide to Consent to Health Care.

2. Who Will Use These Guidelines?

This document is primarily for health care providers requesting consent to health care from their patients, or those who are asked to conduct an assessment of an adult's ability to make a health care decision at the request of another health care provider.

The *Health Care (Consent) and Care Facility (Admission) Act* (the Act) defines "health care provider" as a person who, under a prescribed Act, is licensed, certified, or registered to provide health care in British Columbia. This includes physicians, nurses, dentists, clinical psychologists, midwives and others (as per the Health Care Consent Regulation Section 3).

The Act defines "health care" as anything that is done for a therapeutic, preventative, palliative, cosmetic or other purpose related to health. This includes a course of health care (e.g., a series of dialysis treatments or a course of chemotherapy), or participation in a medical research program.

3. Please Note ...

Certain information appears in boxes:

√ indicates especially important information

☐ indicates a guiding principle

2. *Introduction:*

The practice guidelines describe the process of determining whether an adult is incapable of giving, refusing or revoking consent to health care, within the context of Part 2, of the *Health Care (Consent) and Care Facility (Admission) Act*.

This Act, and therefore these guidelines, do not apply to:

- the psychiatric treatment and care of an adult who is *involuntarily* admitted to a mental health facility under the *Mental Health Act*.

> √ If an involuntary psychiatric patient requires non-psychiatric treatment (e.g., surgery), the health care legislation will apply.

- the provision of treatment to patients under the communicable disease provisions of the *Health Act* or the treatment provisions of the *Venereal Disease Act*.

- emergency treatment being provided by emergency medical assistants (e.g., ambulance crews)

- organ donations and transplants - these are governed by the *Human Tissue Gift Act*.

- non-therapeutic sterilization of adults who are incapable of making a health care decision – substitute consent for such procedures is prohibited by a decision of the Supreme Court of Canada.

Three flow charts identifying the steps in the health care consent process are contained in Appendix C of the Health Care Providers Guide to Consent to Health Care. The charts show the different steps as they apply to:

(a) urgent or emergency health care situations,
(b) minor health care situations, and
(c) major health care situations.

3. *Guiding Principles:*

The process of determining whether an adult is incapable of making a health care decision is based on the following guiding principles:

1. The process begins with the presumption that the adult is capable of making health care decisions.

2. The process is concerned solely with a specific health care decision to be made by the adult.

3. The process must always serve the interests of the adult.

4. The process is conducted fairly and respectfully.

5. Health care providers involved in the process respect and protect the adult's self esteem, well-being and right to privacy.

6. The process is conducted in consultation with the adult and those who are supportive of the adult.

√ These Guidelines reflect current best practice.

4. *When Does A Health Care Provider Test for Incapability?*

The Act requires that health care providers obtain a valid consent (sometimes called informed consent) from their patients before providing health care.

√ One exception to this rule is a situation where urgent or emergency health care is required and the adult is incapable of making a health care decision.

Obtaining consent to health care is a process that begins with the presumption that the adult is capable of making a decision about whether to give, refuse, or revoke consent. An adult is entitled to have this presumption respected until his or her *incapability* is demonstrated.

A health care provider may become concerned that the adult does not understand the health care information being provided, ***or*** a spouse, family member, friend or someone on the adult's care team may bring forward a concern. In these situations the process involves further exploration of whether the adult is incapable of making the health care decision and needs to be documented in detail.

If the health care provider has reason to conclude that the adult is incapable of making a decision, the health care provider should determine if the adult has:

- a Committee of Person, or
- a Representative under the *Representation Agreement Act* with the authority to make health care decisions.

√ Even if the adult has a Committee of Person or Representative, the health care provider should still first determine whether the adult is incapable of making the particular health care decision, before seeking substitute consent. If the adult is capable, the adult's decision should be respected, and substitute consent is not necessary.

If the adult has a Committee of Person or a Representative with the authority to make health care decisions, the health care provider will ask this individual to give consent.

If there is no Committee of Person or Representative, the health care provider must ask the adult's spouse or another family member to act as a temporary substitute decision maker (TSDM).

5. *Who Tests For Incapability?*

Any health care provider (e.g., family physician, surgeon, or a dentist) who proposes to provide health care to an adult and is concerned about the adult's incapability to give or refuse consent, will need to test for incapability before treatment begins. This need not be an elaborate process and the guidelines in this document are reflective of current best practice.

A health care provider might seek the opinion of another health care provider **with expertise in determining incapability. However, the responsibility for obtaining valid consent remains with the health care provider proposing the health care.**

6. *The Legal Test of Incapability*

Section 7 of the *Health Care (Consent) and Care Facility (Admission) Act* sets out **the legal test for determining incapability to give, refuse, or revoke consent to health care.**

The Act requires that the health care provider base the determination of incapability on whether or not the adult demonstrates that he or she understands:

- the information given by the health care provider about both the adult's health condition and the proposed treatment; and
- that the information given applies to the adult's situation.

√ The latter point is particularly critical. Some adults may understand fully all the information being given about their illness and the proposed treatment, but do not accept that this applies to them.

7. *What Information Must Be Provided Before Obtaining Consent?*

Before a health care decision is obtained from the adult, the health care provider must give the adult the information that a reasonable person would require to:

- understand the proposed health care, and
- make a decision about whether or not to have the treatment.

The Act states that the health care provider must tell the adult, *in a manner appropriate to the adult's skills and abilities*, about the following:

- the condition for which the health care is proposed
- the nature of the proposed health care
- the risks and the benefits of the proposed health care that a reasonable person would expect to be told about (including the consequences of no treatment), and
- alternate courses of **reasonably available** health care.

In addition, the health care provider must give the adult an opportunity to ask questions and receive answers about the **proposed** health care.

8. *Communication*

The health care provider must communicate with the adult in a manner appropriate to the adult's skills and abilities, and **may** allow supportive family and friends to help the adult understand or demonstrate understanding.

√ Assistance from family or friends who know the adult and the adult's manner of communicating is strongly encouraged.

Health care providers keep in mind that an adult may be reluctant to ask questions or seek clarification. The backgrounds of both the adult and the health care provider (e.g., language, culture, familiarity) will affect how information is given and understood.

The health care provider considers whether there is a need to enhance communication through:

- support materials
- alternative communication techniques
- by changing the environment in which the dialogue is occurring, and
- by enlisting others, familiar with the adult's manner of communication, to help the adult understand the information.

This may include the use of interpreters or the assistance of family and friends. Attachment #1 has additional information on factors and barriers affecting communication and further suggestions on how to enhance communication.

Sometimes new communication difficulties develop. For example, if a person has had a stroke, he or she may be experiencing new speech difficulties. If no one is familiar with the best way to communicate with the adult, the health care provider may wish to consult with a speech and language pathologist.

9. *Support of Family, Friends and Advocates*

Family, friends, or community advocates can offer valuable assistance in the communication process. The adult's spouse, relatives or friends will likely be familiar with the adult's manner of communication and may help facilitate effective communication with the adult by discussing with the health care provider:

- the best way to ask or pose questions (e.g., use of repetition, breaking the questions into parts)
- the adult's characteristic responses and what they mean (e.g., eye-blink responses).

√ Spouse means a person who:

- is married to another person and is not living separate and apart, within the meaning of the *Divorce Act* (Canada), from the other person, or
- is living with another person in a marriage-like relationship.

For the purpose of the Act, the marriage or marriage-like relationship may be between members of the same sex.

The role of the support person is to help the health care provider communicate with the adult, and vice versa.

When a health care provider is not familiar with the way the adult communicates, the support person *conveys* the information to the adult (e.g., clarifying questions as necessary) and *interprets* the adult's responses for the health care provider. The interaction between the health care provider and the support person is **focused** on how the adult communicates, not on the nature of the decision that has to be made. *The support person is not the adult's substitute decision-maker.*

10. *Determining Understanding*

The health care provider can offer the information about the adult's health condition and the proposed health care in one of two ways:

- Each piece of information is given to the adult separately, starting with the condition for which the health care is proposed. Immediately following each piece of information, the health care provider discusses it with the adult to determine whether the adult understands what has been said.
  Or ...
- All of the information is given at once. The health care provider discusses the information with the adult, again to determine whether the adult understands what has been said.

The health care provider ***engages in a dialogue*** with the adult to determine whether or not the adult ***understands*** the information that has been given.

An adult demonstrates understanding when he or she:

- expresses, ***in the adult's manner of communication***, the information that has been given; and,
- indicates that the information applies to her/his own situation.

Adults who are unable to provide clear descriptive answers in response to open-ended questions may indicate understanding in other ways. Adults who can respond consistently to a series of close-ended questions (yes/no) or whose responses to questions are consistent over time (e.g., an adult experiencing memory deficits) may be demonstrating understanding.

When deciding whether the adult is incapable of making the health care decision, the health care provider must keep in mind that:

- the presence of a mental illness, intellectual disability, physical illness, cognitive impairment or speech and language impairment does not mean that an adult is incapable of making the decision,
- the adult's way of communicating is not grounds for deciding that she or he is incapable of making the decision,
- the adult **has the right to** voluntarily incur risk if she or he understands the consequences of making a decision not to receive health care,
- the issue of incapability is focused only on the health care decision that has to be made at the time,
- a determination of incapability must be done for each specific health care decision regardless of any previous determination of incapability or the adult's ability to make other types of health care decisions.

A further overview of factors affecting understanding is in Attachment #2.

11. Documentation and Notification

The health care provider documents all stages of the process including:

- information provided to the adult
- any problems identified in communicating with the adult
- steps taken to overcome communication problems
- the extent of consultation with others (i.e., adult's spouse, any relative, friend or health care provider with appropriate expertise) in helping the adult to understand or to demonstrate an understanding of the information
- the adult's expressed understanding of the information and that the information pertains to the adult (i.e., the adult's decision and other details concerning the decision)
- problems encountered.

The health care provider should tell the adult and any support person who is accompanying the adult, the result of the test of incapability. This may include explaining the reasons for the determination and answering the adult's questions.

12. What to do if the Adult is Incapable

If the adult is incapable of making the health care decision, a substitute decision may be made by the following person in ranked order:

- the adult's court-appointed "**Committee of the Person**", or
- the adult's representative named in a Representation Agreement, providing the representative has the authority to make health care decisions.
- the adult's spouse (including common law spouse) or a near relative (e.g., a parent, daughter, or brother) acting as a temporary substitute decision maker
- a person authorized by the Public Guardian and Trustee, or
- the Public Guardian and Trustee.

The Health Care Providers Guide to Consent Sections 5, 6, & 7 has a detailed explanation of how substitute consent is obtained and notification requirements for major health care.

Attachment #1: Communication

1. Factors and Barriers Affecting Communication with Adults

Information is to be communicated to the adult in a manner appropriate to the adult's skills and abilities. The health care provider considers the adult's mode of communication and identifies any general factors that may affect the adult's ability to communicate including:

- the effect of the illness (e.g., trauma, pain, and stress)
- the effect of anxiety concerning the proposed health care or the situation (e.g., the adult being in an unfamiliar, hospital environment)
- the amount of time the adult requires to respond
- the amount of information the adult can comprehend at one time
- how the adult responds to unfamiliar or new information
- cultural and language issues
- strongly held belief systems.
- visual limitations
- hearing impairments
- speech and language disorders (e.g., aphasia)
- literacy
- limitations in motor control.

2. Enhancing Communication

The health care provider may wish to consult with a speech and language pathologist on speech and language disorders. As well, communication may be enhanced by the use of support materials, communication techniques and environmental adaptations such as:

- communication aids (e.g., Bliss Boards, Pic symbols, voice prostheses)
- hearing devices (e.g., hearing aids, pocket talkers)
- interpreter assistance for the deaf and hard of hearing and for non-English speaking adults
- visual materials to supplement information presented verbally (e.g., illustrations, written materials, videotapes).
- using clear language
- eliminating jargon or technical terms
- presenting manageable amounts of information
- using eye-blink, movement responses (e.g., nodding head) or facilitated communication
- using examples and making reference to issues/events from the adult's life
- providing opportunities for feedback and clarification by repeating or

paraphrasing what the adult has said

- matching verbal and nonverbal cues
- providing full explanation, avoiding the need for inferences
- ascertaining which information about the health care proposed is most salient to the adult in making the decision.
- providing adequate privacy and time
- ensuring safety and comfort.

Attachment #2:

Cognitive And Other Factors Affecting Understanding

The process of understanding and demonstrating understanding may be affected by **a variety of factors**. When any of these factors are present, the health care provider considers whether the adult's understanding is compromised.

The following factors, while not an all-inclusive list, should be considered in determining incapability:

1. **Cognitive**

- attention (e.g., ability to concentrate on the information being provided)
- reasoning (e.g., ability to make choices)
- judgment (e.g., ability to draw conclusions)
- learning and retention (e.g., ability to remember information long enough to understand)

2. **Communication Disorders:**

- receptive and expressive communication skills (e.g., **difficulty in understanding when listening or when reading; difficulty in expressing oneself when speaking or writing as occurs in aphasia following stroke or head injury; ability to comprehend the language or mode of expression in which information is given)**

- **speech disorders (e.g., difficulty in pronouncing speech clearly following stroke, head injury or nerve disease; loss of voice following surgical removal of the larynx)**

3. **Mental Health/Psychiatric:**

- delirium (i.e., fluctuating attention and cognitive functioning associated with altered psychomotor activity and disturbed sleep-wake cycle)
- depression or mania
- delusions - firm, fixed and false beliefs maintained despite evidence to the contrary, and not ordinarily accepted by members of the adult's family, culture or social group. Delusions should not be confused with Idiosyncratic or eccentric beliefs.
- hallucinations
- phobias, panic, anxiety or obsessions
- perception of dependence another person

- inability to control one's actions (e.g., the adult may say or do things contrary to her/his own expressed wishes as a result of certain conditions affecting judgment and reasoning).

√ Idiosyncratic or eccentric beliefs about health care are not, in and of themselves, indicators of incapability to give, refuse, or revoke health care.

APPENDIX F

Brochures Related to Health Care Consent

BRITISH COLUMBIA

Ministry of Health and
Ministry Responsible for Seniors

B.C.'s New Adult Guardianship Laws:

Supporting Self-Determination For Adults in British Columbia

Consent to Health Care

What Adults, Families and Health Care Providers Need to Know About the New Law

Four new laws in B.C. ensure that our rights and wishes will be respected, even if we are unable to make our own decisions. The new laws are:

- *The Representation Agreement Act*
- *The Health Care (Consent) and Care Facility (Admission) Act*
- *The Adult Guardianship Act, and*
- *The Public Guardian and Trustee Act.*

This brochure explains key provisions of Part 2 of the ***Health Care (Consent) and Care Facility (Admission) Act*** - Consent to Health Care.

If you are an adult needing health care, a family member or a health care provider, B.C.'s new *Health Care (Consent) and Care Facility (Admission) Act* will affect you.

It confirms the right of adults (someone 19 years of age or older) to make their own health care decisions, either independently or with support from family and friends. For the first time, the law formally recognizes the role of family and friends who support adults needing assistance with health care decision-making.

THE GENERAL RULE STILL IS: **adults can be given health care only with their consent**.

But in the event that an adult is unconscious, mentally incapable, or otherwise unable to give consent, the new law sets out procedures to follow.

When is an adult's consent NOT required?

The main exceptions to the general rule are:

- when urgent or emergency health care is required and the adult is incapable of making a consent decision
- when involuntary psychiatric treatment is needed
- for preliminary examinations such as triage or assessment, and
- when communicable diseases are involved.

Health care providers include physicians, dentists, nurses, physiotherapists, psychologists, occupational therapists, optometrists, chiropractors and others.

What if an adult is unable to give or refuse consent?

Given some time, and the necessary information and support, most adults can make their own decisions. An adult must be approached first for a decision. If the health care provider believes an adult is capable, then they have the right to give, refuse or revoke consent.

In deciding whether an adult is incapable of making a health care decision, the health care provider must determine whether the adult demonstrates an understanding of the information that the health care provider has given about the health care, and that this information applies to the situation of the adult.

Who can make health care decisions for an adult who is unable to make their own decision?

The Act sets out a ranked list of decision-makers.

- **A court-appointed committee of person**: Under the Patients Property Act, the court

may have appointed a committee for an adult who is incapable of making health care decisions.

- **A representative**: An adult may, when able to do so, have planned for their future by making a Representation Agreement authorizing a representative to make health care decisions on their behalf if they werre unable to make their own decisions.
- **A temporary substitute decision-maker**: If there is no representative or court-appointed committee of person, a health care provider must choose the nearest relative from among the adult's spouse, adult child, parent, sibling or other relative who qualifies to make a health care decision.

What if there is no one to act as a decision-maker?

If there is no committee, representative or family member qualified and willing to act on behalf of the adult, the health care provider must contact the Public Guardian and Trustee. That office can authorize another representative, friend or member of the adult's support network to make substitute decisions. If no one suitable is available, the Public Guardian and Trustee can make the health care decision.

What are the duties of a decision-maker?

When making a health care decision on the adult's behalf, all decision-makers, no matter how they are appointed, must:

1. consult with the adult to the greatest extent possible
2. follow any applicable instructions or wishes the adult expressed while capable – orally, or in writing in a Representation Agreement, living will or other type of advance health care directive
3. follow the adult's beliefs and values if their wishes aren't known
4. make the decision in the adult's best interests if their beliefs and values aren't known.

When making a decision in the best interests of the adult, a decision-maker must consider:

- the adult's current wishes
- the likely effect of receiving or not receiving the proposed health care
- the expected benefits, weighed against the risk of harm, and
- whether there are less restrictive or less intrusive alternatives that would be as beneficial.

Decision-makers may make only those decisions they have authority to make. They must always act in good faith and use reasonable care.

What if someone disagrees with the decision of the substitute decision-maker?

If there are concerns about the decision of the temporary substitute decision-maker that cannot be resolved informally, any of the following can ask the Health Care and Care Facility Review Board to review the decision:

- the adult
- the adult's spouse, relative or friend
- a health care provider caring for the adult
- the Public Guardian and Trustee, or
- the Community Legal Assistance Society in certain circumstances

How can I get more information?

This is one in a series of brochures about B.C.'s new adult guardianship laws. Another in this series about review boards is called: ***"Health Care and Care Facility Review Board: Providing Safeguards"***.

For more information, write, call or fax:

MINISTRY OF HEALTH
5-2, 1515 Blanshard Street
Victoria, BC V8W 3C8
Tel: (250) 952-1083
Fax: (250) 952-2205
Website: www.hlth.gov.bc.ca

THE PUBLIC GUARDIAN AND TRUSTEE OF B.C.
Health Care Decisions Team
#700-808 West Hastings Street
Vancouver, BC V6C 3L3
Tel: (604) 775-0775
Toll-Free: 1-877-511-4111
Fax: (604) 775-0777
Website: www.trustee.bc.ca

BRITISH COLUMBIA
Ministry of Health and
Ministry Responsible for Seniors

B.C.'s New Adult Guardianship Laws:

Supporting Self-Determination For Adults in British Columbia

Health Care and Care Facility Review Board: Providing Safeguards

What if I Don't Agree with a Health Care Decision Made by a Substitute Decision-Maker?

Four new laws in B.C. ensure that our rights and wishes will be respected, even if we are unable to make our own decisions. The new laws are:

- *The Representation Agreement Act*
- *The Health Care (Consent) and Care Facility (Admission) Act*
- *The Adult Guardianship Act, and*
- *The Public Guardian and Trustee Act.*

This brochure explains key provisions of Part 4 of the ***Health Care (Consent) and Care Facility (Admission) Act*** - Reviews and Appeals.

The new *Health Care (Consent) and Care Facility (Admission) Act* confirms your right to make decisions about your own health care. The Act also allows someone to make those decisions for you if you are unable to do so yourself.

But what if you are unable to make a health care decision, and you or someone close to you objects to a decision made by your health care substitute decision-maker? What if the decision is not consistent with your wishes, values or beliefs? Under such circumstances, the decision can be reviewed by the Health Care and Care Facility Review Board.

In addition, if your health care provider believes that your substitute decision-maker has refused treatment for you that should be agreed to, they can seek a review.

What can the review board do?

If asked, the review board will hold a hearing to reconsider the decision to provide or withhold major health care.

Who can ask for a review?

As the adult concerned, you can ask for a review. Certain other people may ask for a review including:

- your spouse, or a relative or friend
- a health care provider who is providing you with health care.

How do I get a decision reviewed?

The health care provider who wishes to provide you with major health care (such as major surgery or other serious procedures), and who believes you are incapable of making the health care decision, must give you a written notice and inform you of your right to a review.

The Health Care (Consent) and Care Facility (Admission) Act came into force on February 28, 2000.

The health care provider must do this as soon as the person chosen has made the health care decision on your behalf.

Your request for a review must be made within 72 hours after the health care decision is made. During that 72 hours, the health care in question may not be given, except in urgent or emergency situations.

You can get help with asking for a review from a friend or relative, legal advocacy organization, or your own lawyer.

Who gets notice of a hearing?

When the review board receives a request for a review, it will set a date for a hearing. That date must be within seven days of the request.

A notice of the hearing date will be sent to you and to the person whose decision is being reviewed. If someone else asked for the review, a notice will be sent to that person as well.

Who is on the review board?

The review board will sit in panels. There are three people on each review panel:

- a health care provider
- a lawyer, and
- someone who is not a health care provider nor a member of the Law Society of B.C.

What happens at the hearing?

If you are notified of the hearing you have a right to attend and to be represented by a lawyer, or an advocate, family member or friend. Each person can present evidence and question witnesses.

What can the review panel do?

The panel can confirm the decision that is being reviewed or make a different decision. The decision can be acted upon as soon as it has been made.

What if I do not agree with the panel's decision?

If you disagree with the Review Board's decision, you can appeal the decision to the Supreme Court of B.C. If you decide to appeal, you must do so within 30 days of the panel's decision.

How can I get in touch with the review board?

HEALTH CARE AND CARE FACILITY REVIEW BOARD
Unit 6, 500 Lougheed Highway
Port Coquitlam, BC V3C 4J2
Tel: (604) 524-7219 or
(604) 524-7220
Fax: (604) 524-7216

How can I get more information?

This is one in a series of brochures about B.C.'s new adult guardianship laws.

For more information, write, call or fax:

MINISTRY OF HEALTH
5-2, 1515 Blanshard Street
Victoria, BC V8W 3C8
Tel: (250) 952-1083
Fax: (250) 952-2205
Website: www.hlth.gov.bc.ca

THE PUBLIC GUARDIAN AND TRUSTEE OF B.C.
Health Care Decisions Team
#700-808 West Hastings Street
Vancouver, BC V6C 3L3
Tel: (604) 775-0775
Toll-Free: 1-877-511-4111
Fax: (604) 775-0777
Website: www.trustee.bc.ca

PUBLIC GUARDIAN AND TRUSTEE OF BRITISH COLUMBIA

B.C.'s New Adult Guardianship Laws:

Supporting Self-Determination For Adults in British Columbia

Planning For Your Future

Representation Agreements: A New Planning Tool for British Columbians

Four new laws in B.C. ensure that our rights and wishes will be respected, even if we are unable to make our own decisions. The new laws are:

- *The Representation Agreement Act*
- *The Health Care (Consent) and Care Facility (Admission) Act*
- *The Adult Guardianship Act, and*
- *The Public Guardian and Trustee Act.*

This brochure explains key provisions of the ***Representation Agreement Act***.

For years, many people have used enduring powers of attorney to plan for a time when they may no longer be able to make their own financial and legal decisions.

For health care issues, people have used advance health care directives (one type being living wills), but there was no certainty that these would be recognized in law.

Now, the *Representation Agreement Act* gives adults in B.C. a way to make reliable plans for the future. In a **Representation Agreement**, we can give instructions for a time when someone else may have to make our decisions about personal and health care, in addition to financial and legal matters.

As well, if a capable adult has expressed their health care wishes orally, or in an advance directive or living will, these wishes must be respected by the representative.

Using a Representation Agreement, you can name someone you trust to be your representative. Or, you can name more than one representative for different purposes. You can, if you want, give general or specific instructions about how your representative should help or make decisions for you.

What kinds of decisions can be covered by an agreement?

Almost any kind of decision you make can be put in a Representation Agreement, including decisions about:

- health care, such as treatments or services you might want or not want
- personal care, such as where you might live
- financial affairs, such as paying bills, investing your money and taking care of your bank accounts
- property, such as selling or re-financing your home

The Representation Agreement Act came into force on February 28, 2000.

- business, such as running your company
- legal affairs, such as instructing a lawyer on your behalf.

When planning for the future, most of us don't know exactly what kinds of decisions will need to be made on our behalf. Therefore, an agreement that will give our representative(s) the ability to address many types of decisions may be required. As a result, for most people, a **general** agreement is the type of agreement that will be needed.

In order to make a general agreement, you must understand the nature of the authority being given to your representative and the effect of giving that authority to that person.

To make a general agreement, the law requires that you consult with a lawyer. Your lawyer is required to sign a certificate that must be attached to your representation agreement. Although your lawyer will charge a fee for preparing a general agreement, making this type of agreement ensures that your representative can make all the decisions you may need. An added advantage is that general agreements may be more easily recognized and more readily accepted by financial institutions and other third parties.

If you are already having difficulty managing your affairs, you can still make a **limited** representation agreement. Your representative would have the ability to make decisions such as:

- personal care, such as where you will live
- routine finances, such as cashing cheques and paying bills, but not selling your house or using credit cards
- major and minor health care, but not refusal of life supporting care and treatment.

When will my agreement be used?

Your representation agreement can be effective immediately or at some time in the future. You can specify when your agreement will take effect.

What should I do with my existing enduring power of attorney or my existing advance health care directive?

You can:

- keep your existing enduring power of attorney
- keep your advance health care directive or living will as an expression of your wishes, values and beliefs about health care, or
- make a Representation Agreement.

Can I still make a new enduring power of attorney?

Yes. In order to give British Columbians the time to become familiar with the new law, you can make an enduring power of attorney until September 5, 2000. Valid powers of attorney made before that date will remain in force.

How can I get more information?

There is a more in depth guide to the *Representation Agreement Act* called: ***"It's Your Choice"***.

This is one in a series of brochures about B.C.'s new adult guardianship laws.

For more information, visit our website, write or fax:

THE PUBLIC GUARDIAN AND TRUSTEE OF B.C.
Adult Guardianship Project
#700-808 West Hastings Street
Vancouver, BC V6C 3L3
Tel: (604) 775-0847
Fax: (604) 775-0207
Website: www.trustee.bc.ca

SCHEDULE

HEALTH CARE CONSENT REGULATION

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FORM 1

FORM 2

PART 1 – INTERPRETATION

Definitions

1 (1) In this regulation:

"Act" means the *Health Care (Consent) and Care Facility (Admission) Act;*

"board" includes a panel of the board;

"chair" includes the chair of a panel of the board;

"community health services society" means any of the following:

(a) North West Community Health Services Society;

(b) Cariboo Community Health Services Society;

(c) Peace Liard Community Health Services Society;

(d) East Kootenay Community Health Services Society;

(e) West Kootenay Community Health Services Society;

(f) Coast Garibaldi Community Health Services Society;

(g) Upper Island Community Health Services Society;

"health care body" means any of the following:

(a) a health care body as defined in the *Freedom of Information and Protection of Privacy Act;*

(b) a facility licensed under the *Community Care Facility Act;*

(c) a community health services society;

"hearing" means a hearing under section 29 of the Act;

"psychosurgery" means a procedure by which

(a) histologically normal brain tissue is, by direct or indirect access to the brain, removed or destroyed or its continuity is interrupted, or

(b) indwelling electrodes are inserted in the brain for pulsed electrical stimulation to alter behaviour or to treat psychiatric illness,

but does not include any neurological procedure used to diagnose or treat intractable physical pain or epilepsy if these conditions are clearly demonstrable;

"review" means a review under section 28 of the Act.

(2) In Part 3, **"adult"**, except in section 9, means the person who is the subject of a review.

PART 2 – CONSENT

Committees that may approve medical research programs

2 (1) The following committees are designated for the purposes of paragraph (b) of the definition of "health care" in section 1 of the Act:

(a) BC Cancer Agency Clinical Investigations Committee;

(b) University of British Columbia Clinical Research Ethics Board;

(c) University of British Columbia Behavioural Research Ethics Board;

(d) Simon Fraser University Research Ethics Review Committee;

(e) University of Victoria Human Research Ethics Committee;

(f) St. Paul's Hospital Ethics Committee for Human Experimentation;

(g) Capital Health Region Research Review and Ethical Approval Committee;

(h) Simon Fraser Health Region Clinical Investigations Committee;

(i) Kelowna General Hospital Research Committee;

(j) Prince George Regional Hospital Research Review Committee;

(k) Penticton Regional Hospital Ethics Committee;

(l) North Okanagan Health Region Research Committee.

(2) This section is repealed on February 28, 2002.

Health care providers

3 The following Acts are prescribed for the purposes of the definition of "health care provider" in section 1 of the Act:

(a) *Chiropractors Act;*

(b) *Dentists Act;*

(c) *Health Professions Act;*

(d) *Hearing Aid Act;*

(e) *Medical Practitioners Act;*

(f) *Nurses (Registered) Act;*

(g) *Optometrists Act;*

(h) *Podiatrists Act;*

(i) *Social Workers Act.*

Major health care

4 The following are designated as major health care:

(a) radiation therapy;

(b) intravenous chemotherapy;

(c) kidney dialysis;

(d) electroconvulsive therapy;

(e) laser surgery.

Health care to which temporary substitute decision maker cannot consent

5 (1) The following types of health care are prescribed for the purposes of section 18 (1) of the Act:

(a) abortion unless recommended in writing by the treating physician and at least one other medical practitioner who has examined the adult for whom it is proposed;

(b) electroconvulsive therapy unless recommended in writing by the treating physician and at least one other medical practitioner who has examined the adult for whom it is proposed;

(c) psychosurgery;

(d) removal of tissue from a living human body for implantation in another human body or for medical education or research;

(e) experimental health care involving a foreseeable risk to the adult for whom the health care is proposed that is not outweighed by the expected therapeutic benefit;

(f) participation in a health care or medical research program that has not been approved by a committee referred to in section 2;

(g) any treatment, procedure or therapy that involves using aversive stimuli to induce a change in behaviour.

(2) The treating physician must inform the Community Legal Assistance Society if

(a) abortion or electroconvulsive therapy is recommended in writing by the treating physician and at least one other medical practitioner who has examined the adult for whom it is proposed, and

(b) a person chosen under section 16 of the Act gives substitute consent to the abortion or electroconvulsive therapy.

(3) The Community Legal Assistance Society must be informed under subsection (2) immediately after the substitute consent has been given.

(4) In this section, **"experimental health care"** means health care

(a) that is a deviation from standard professional practice, and

(b) that has not been approved by a committee referred to in section 2.

Notice of substitute consent – major health care

6 A notice under section 14 (4) (b) of the Act must be in Form 1.

PART 3 – REVIEWS

Request form

7 A request under section 28 of the Act must be in Form 2.

Advocacy organization

8 (1) The Community Legal Assistance Society is prescribed for the purposes of sections 28 (2) (e) and 29 (4) of the Act.

(2) This section is repealed on February 28, 2002.

Requests by advocacy organization

9 The Community Legal Assistance Society may, under section 28 (2) (e) of the Act, request a review if

(a) the proposed health care is either abortion or electroconvulsive therapy,

(b) the proposed health care is recommended in writing by the treating physician and at least one other medical practitioner who has examined the adult for whom it is proposed,

(c) the adult is incapable of deciding whether or not to make a request for a review, and

(d) the Community Legal Assistance Society has reasonable grounds to believe a review is in the best interests of the adult.

Right to information

10 (1) For the purposes of a review, the board has the right to any information that

(a) is necessary to enable the board to perform its duties under the Act, and

(b) is in a record in the custody or control of a health care provider or health care body.

(2) A health care provider or health care body that has custody or control of a record containing information the board is entitled to under subsection (1) must disclose that information to the board at the request of the chair.

(3) If the chair determines that

(a) information obtained from records disclosed under this section is incomplete or inadequate for the purposes of a review, and

(b) a health care provider has information that is relevant to the review,

the health care provider must, at the request of the chair, give to the board a written report explaining the health care that is the subject of the review and the reasons for deciding that the adult needs the health care and is incapable of giving or refusing consent to it.

Hearings

11 (1) Unless the chair orders otherwise, a hearing before the board is not open to the public.

(2) The board may do one or both of the following:

(a) allow a spouse, relative or friend of the adult to be present during the hearing;

(b) request a person to assist the board in communicating with the adult.

Adjournments

12 The board may adjourn a hearing

(a) to permit the adult to retain legal counsel,

(b) to obtain assistance in communicating with the adult, or

(c) for any other purpose it considers necessary.

Counsel

13 Whether or not an adult is incapable of retaining or instructing legal counsel, legal counsel may act for the adult in a review.

Majority decision

14 The decision of the majority of its members is the decision of the board.

FORM 1

HEALTH CARE (CONSENT) AND CARE FACILITY (ADMISSION) ACT

Section 14 (4) (b) of the Act

NOTICE OF INCAPABILITY AND SUBSTITUTE CONSENT (MAJOR HEALTH CARE)

To .....: [*name of adult for whom substitute consent has been given (please print)*

I, ... [*name of health care provider (please print)*], am your physician/other health care provider and I have proposed the following health care for you:

.....

.....

.....

I have determined, using the legal test of incapability stated in section 7 of the *Health Care (Consent) and Care Facility (Admission) Act,* that you are incapable of giving or refusing consent to the health care described above.

To the best of my knowledge, you do not have a committee, or representative, who is authorized to make a decision for you about the health care described above.

Therefore, I have chosen ..... [*name and phone number of Temporary Substitute Decision Maker (please print)*] as temporary substitute decision maker for you and he/she has ☐given ☐refused [*check ONE box only*] substitute consent to the health care described above.

You, your spouse or a relative or friend of yours has the right to request a review of the decision to give or refuse substitute consent for the health care described above. A request for a review must be delivered to the Health Care and Care Facility Review Board within 72 hours after the decision to give or refuse substitute consent for the health care described above was made. The request must be delivered to:

Registrar, Health Care and Care Facility Review Board
Unit 6, 500 Lougheed Highway
Port Coquitlam, British Columbia
V3C 4J2
Tel: 604-524-7219 or 604-524-7220
Fax: 604-524-7216

The decision to ☐give ☐refuse [*check ONE box only*] substitute consent to the health care described above was made on .....[*dd/mm/yyyy*] at ..... [*time*] am/pm.

..... [*signature of health care provider*] ..... [*position/title*]

..... [*dd/mm/yyyy*] ..... [*time*] am/pm.

FORM 2

HEALTH CARE (CONSENT) AND CARE FACILITY (ADMISSION) ACT

Section 28 of the Act

REQUEST FOR REVIEW

I am requesting a review of the decision made on .....[*dd/mm/yyyy*] at ..... [*time*] am/pm. by ..... [*name of substitute decision maker*] to ☐give ☐refuse ☐revoke [*check ONE box only*] substitute consent to the following health care:

.....

.....

.....

This health care is ☐being provided by ☐proposed by [*check ONE box only*] ..... [*name of health care provider*] for .....

[*name of adult to whom health care is being provided/is proposed*].

In summary, the reasons for requesting a review are as follows:

.....

.....

.....

APPLICANT INFORMATION

..... [*name*]

..... [*address*]

..... [*city*] ..... [*province*]

..... [*telephone*] ..... [*fax*] ..... [*postal code*]

..... [*relationship to adult who is subject of this request*].

ADULT INFORMATION

..... [*name*]

..... [*address*]
..... [*city*] ..... [*province*]
..... [*telephone*] ..... [*fax*] ..... [*postal code*]
..... [*facility in which adult is currently located, if applicable*].

HEALTH CARE PROVIDER INFORMATION

..... [*name*]
..... [*address*]
.....[*title/position/occupation*]
..... [*city*] ..... [*province*]
..... [*telephone*] ..... [*fax*] ..... [*postal code*].

SUBSTITUTE DECISION MAKER INFORMATION

..... [*name*]
..... [*address*]
.....[*title/position/occupation*]
..... [*city*] ..... [*province*]
..... [*telephone*] ..... [*fax*] ..... [*postal code*]
..... [*relationship to adult who is subject of this request*].

This request must be delivered to the board within 72 hours after the decision to be reviewed is made, or the Board may not be able to consider your request. The request must be delivered to:

Health Care and Care Facility Review Board
Unit 6, 500 Lougheed Highway
Port Coquitlam, British Columbia
V3C 4J2
Tel: 604-524-7219 or 604-524-7220
Fax: 604-524-7216

The Board must hold a hearing within 7 days of receiving a request for review. Please answer the following questions:

Where would you like the hearing to be held? .....

Do you need a translater? yes / no [*circle one*]

Are you being represented by legal counsel? If yes, please complete the following:
..... [*name of legal counsel*]
..... [*address*]
..... [*city*] ..... [*province*]
..... [*telephone*] ..... [*fax*] ..... [*postal code*]

The Board must inquire fully into the circumstances of your case. Please send the Registrar copies of all documents you intend to rely on at least 24 hours before the hearing

..... [*signature of applicant*] ..... [*dd/mm/yyyy*] ..... [*time*] am/pm.